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U.S. Citizenship and Immigration Services

PUBLIC COPY

[redacted]

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FILE: [redacted] Office: TEXAS SERVICE CENTER Date: OCT 16 2007

SRC 05 235 50549

IN RE: Petitioner:
Beneficiary: [redacted]

PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The petitioner is a convenience store. It seeks to employ the beneficiary permanently in the United States as a manager. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the U.S. Department of Labor (DOL).[1] The director determined that the petitioner had not established eligibility pursuant to section 203(b)(3) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3). The director denied the petition accordingly.

The record shows that the appeal is properly filed, timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's denial dated January 3, 2006, the two issues in this case, *inter alia*,[2] are whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence, and whether or not the petitioner has demonstrated that the beneficiary is qualified to perform the duties of the proffered position.

Section 203(b)(3)(A)(i) of the Act, 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States.

The regulation at 8 C.F.R. § 204.5(g)(2) states in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750 Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the U.S. Department of Labor. *See* 8 C.F.R. § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 Application for Alien Employment Certification as certified by the U.S. Department of Labor and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

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[1] According to the Application for Alien Employment Certification certified on June 6, 2005, the name of the employer is [redacted]

[2] The director discussed other issues concerning information not provided by the beneficiary in the petition, NSEERS registration, and information not given to the U.S. Department of Labor that are beyond the scope of the AAO's jurisdiction in this matter.

Here, the Form ETA 750 was accepted on January 13, 1998.[3] The proffered wage as stated on the Form ETA 750 is $21.62 per hour ($44,969.60 per year). The Form ETA 750 states that the position requires two years of experience in the proffered position.

The AAO takes a *de novo* look at issues raised in the denial of this petition. *See Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.[4]

Relevant evidence in the record includes copies of the following documents: the original Form ETA 750, Application for Alien Employment Certification, approved by the U.S. Department of Labor for [redacted]; a letter by [redacted] from [redacted] Stop 12 dated August 17, 2005; a letter from [redacted] of Houston, Texas, dated August 12, 2005; a bill of sale document dated July 1, 1998 between [redacted]; an agreement to purchase and sale dated July 1, 1998 between [redacted] a promissory note dated July 1, 1998, between [redacted] and [redacted] Employers Quarterly Federal Tax Form (Form-941) for the first two quarters of 2005; [redacted] U.S. Internal Revenue Service Form 1120 tax returns for 2001, 2002, 2003 and 2004; [redacted] U.S. Internal Revenue Service Form 1120 tax returns for 1998 (partial copy), 1999 and 2000, and, copies of documentation concerning the beneficiary's qualifications as well as other documentation.

In response to the director's request for evidence of September 27, 2005, counsel has submitted the following relevant evidence: an explanatory letter dated December 12, 2005; letters dated August 5, 2002, and December 10, 2005, and also an undated letter from the petitioner; and correspondence with the IRS and tax returns requests (that are found in evidence in the record).

The evidence in the record of proceeding shows that [redacted] is structured as a C corporation. On the petition, it claimed to have been established in 1988, and it stated in the petition that it currently employed one worker. According to the tax returns in the record, the corporation's fiscal year is based on a calendar year. On the Form ETA 750B, signed by the beneficiary on January 12, 1998. the beneficiary did not claim to have worked for either [redacted] or [redacted]

As a preface to the following discussion, concerning the ability to pay the proffered wage, according to the I-140, the petitioner is the entity stated on the petition, [redacted] The petitioner states it is a successor-in-interest by an asset sale from [redacted] The applicant listed on the labor certification is [redacted]

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[3] It has been approximately nine years since the Application for Alien Employment Certification has been accepted and the proffered wage established. According to the employer certification that is part of the application, ETA Form 750 Part A, Section 23 b., states "The wage offered equals or exceeds the prevailing wage and I [the employer] guarantee that, if a labor certification is granted, the wage paid to the alien when the alien begins work will equal or exceed the prevailing wage which is applicable at the time the alien begins work."

[4] The submission of additional evidence on appeal is allowed by the instructions to the CIS Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

[5] Counsel initially submitted the tax returns for [redacted] for 1998, 1999, and 2000 as evidence of the ability to pay the proffered wage.

Although the labor certification is in the name of [redacted]. and the petition is in the name of [redacted] stated it is the purchaser of the assets of [redacted] Handy Stop #12. According to counsel, although there is no evidence on the labor certification of its amendment changing the corporation name, [redacted] stated by its letter dated March 1, 2006, that it informed DOL of the business sale and ownership change, and [redacted] continuation of the job offer to the beneficiary. Since there is no evidence of any amendment of the labor certification applicant, we are constrained by the labor certification as submitted, and do not find the labor certification to have been issued with such amendments. Therefore as the priority date of the labor certification is January 13, 1998, and according to the agreement to purchase and sale between [redacted] and [redacted] a transfer of assets and the business operation (i.e. not a stock transfer of ownership) occurred on dated July 1, 1998, the original employer's [redacted] ability to pay the proffered wage must be determined.

However it is possible for [redacted] to be a successor in interest to the obligations under the labor certification, after certification. To achieve this, [redacted] must establish that it has assumed all of the rights, duties, obligations, and assets of the original employer; continue to operate the same type of business as the original employer; and, establish that the new business has the ability to pay as of the priority date. *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1981). Counsel has submitted a bill of sale document dated July 1, 1998 between [redacted] and [redacted]; an agreement to purchase and sale dated July 1, 1998 between [redacted]. and [redacted]; and, a promissory note dated July 1, 1998, between [redacted] and [redacted] In the proceeding, counsel submitted the federal corporate tax returns for Alnoor Corporation for the years 1999, 2000, 2001, 2002, 2003 and 2004 as evidence of the petitioner's ability to pay the proffered wage. We find that [redacted] is the successor in interest to [redacted] in this matter.

On appeal, the petitioner asserts that the new evidence submitted on appeal establishes that the petitioner has the ability to pay the proffered wage and that the beneficiary has the required two years of experience.

Accompanying the appeal, counsel submits a legal brief and additional evidence that includes the following documents: an affidavit from the beneficiary attested March 2, 2006; an employment reference from [redacted] president of [redacted] Houston, Texas, dated March 1, 2006; a letter from the petitioner dated March 1, 2006; the petitioner's IRS Form W-3 Transmittal of Wage and Tax Statements for year 1998; the petitioner's IRS Form W-2 Wage and Tax Statements for year 1998 for two employees; Alnoor Corporation U.S. Internal Revenue Service Form 1120 tax returns for 1999 and 2000; a IRS transcript for tax year 2000 stating that in 2000 a W-2 statement was submitted by [redacted] for [redacted] stating wages of $27,000.00; and approximately 123 pages of the petitioner's bank checking statements for the year 2000, January 1, 1999 to September 30, 1999, July 1, 1998 to December 31, 1998.[6]

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[6] Counsel's reliance on the balances in the petitioner's bank account is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on its tax return, such as the petitioner's taxable income (income minus deductions) or the cash specified on Schedule L that will be considered below in determining the petitioner's net current assets.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977). *See also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, Citizenship and Immigration Services (CIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonegawa,* 12 I&N Dec. 612 (BIA 1967).

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner has not established that it employed and paid the beneficiary the full proffered wage from the priority date.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, CIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F.Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F.Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F.Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Reliance on the petitioner's gross sales and profits exceeded the proffered wage is misplaced. Showing that the petitioner's gross sales and profits exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

The tax returns for Jalal Enterprises Inc. demonstrate the following financial information concerning the petitioner's ability to pay:

- In 1998, the partial Form 1120 stated net income of $52,554.00.

Since the proffered wage is $44,969.60 per year, Jalal Enterprises Inc. did have the ability to pay the proffered wage from an examination of its net income for year 1998.

The tax returns for demonstrate the following financial information concerning the petitioner's ability to pay:

- In 1999, the Form 1120 stated net income of $33,103.00.
- In 2000, the Form 1120 stated net income of $47,382.00.
- In 2001, the Form 1120 stated net income of $30,004.00.
- In 2002, the Form 1120 stated net income of $9,526.00.
- In 2003, the Form 1120 stated net income of $15,163.00.

- In 2004, the Form 1120 stated net income of $8,723.00.

Since the proffered wage is $44,969.60 per year, did not have the ability to pay the proffered wage from an examination of its net income for years 1999, 2001, 2002, 2003 and 2004.

If the net income the petitioner demonstrates it had available during the period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, CIS will review the petitioner's assets. The petitioner's total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. Rather, CIS will consider net current assets as an alternative method of demonstrating the ability to pay the proffered wage.

Net current assets are the difference between the petitioner's current assets and current liabilities.[7] A corporation's year-end current assets are shown on Schedule L, lines 1 through 6 and include cash-on-hand. Its year-end current liabilities are shown on lines 16 through 18. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets.

- s net current assets[8] could not be determined based upon the evidence submitted.
- net current assets during 1999, 2000, 2001, 2002, 2003, and 2004 were $31,735.00, $89,497.00, $85,060.00, $104,784.00, $90,784.00 and $109,111.00 respectively.

Therefore, for the years for which tax returns were submitted with the exception of 1999, the did have sufficient net current assets to pay the proffered wage.

The evidence submitted establishes that the petitioner has the continuing ability to pay the proffered wage beginning on the priority date.

As set forth in the director's denial dated January 3, 2006, the director found that the petitioner has not demonstrated that the beneficiary is qualified to perform the duties of the proffered position

To determine whether a beneficiary is eligible for an employment based immigrant visa, Citizenship and Immigration Services (CIS) must examine whether the alien's credentials meet the requirements set forth in the labor certification. In evaluating the beneficiary's qualifications, CIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. CIS may not ignore a term of the

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[7] According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

[8] Only a partial tax return was submitted by Jalal Enterprises Inc. for 1998. No Schedule L was submitted for that year.

labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). *See also, Mandany v. Smith*, 696 F.2d 1008, (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

In the instant case, the Application for Alien Employment Certification, Form ETA-750A, items 14 and 15, set forth the minimum education, training, and experience that an applicant must have for the position of a manager. In the instant case, item 14 describes the requirements of the proffered position as follows:

14.	Education	
	Grade School	Blank
	High School	Blank
	College	Blank
	College Degree Required	Blank
	Major Field of Study	Blank

The applicant must also have two years of experience in the job offered, the duties of which are delineated at Item 13 of the Form ETA 750A and since this is a public record, will not be recited in this decision. Item 15 of Form ETA 750A relating to other special requirements states the work schedule days and hours to be Wednesday to Sunday 3:00 P.M. to Midnight.

The beneficiary set forth his credentials on Form ETA-750B and signed his name under a declaration that the contents of the form are true and correct under the penalty of perjury. On Part 15, eliciting information of the beneficiary's work experience, he represented that he has been employed as a manager with the Premo Food Store, Houston, Texas from May 1993 to November 1995 full-time (40 hours each week) with duties exactly as stated in item 13 above mentioned. After that employment the beneficiary worked as a manager with the McCarty Supermarket, Houston, Texas, from December 1996 to October 1997 with duties exactly as stated in item 13 above mentioned.

The regulation at 8 C.F.R. § 204.5(l)(3) provides:

> (ii) *Other documentation—*
>
> > (A) *General.* Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.
> >
> > (B) *Skilled workers.* If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

The beneficiary has been a manager with two convenience stores in Houston, Texas from May 1993 to November 1995 and from December 1996 to October 1997 with duties exactly as stated in item 13 above mentioned.

Counsel has submitted an employment reference by [redacted] Houston, Texas dated March 1, 2006. The letter gave the name, address, and title of the employer, and a description of the experience of the alien.[9] According to the evidence submitted, The AAO finds that the beneficiary has more than two years of qualifying experience as a manager.

The AAO thus finds that the preponderance of the evidence does demonstrate that the beneficiary acquired two years of managerial experience from the evidence submitted into this record of proceeding and thus the petitioner has demonstrated that the beneficiary is qualified to perform the duties of the proffered position.

For the years for which tax returns were submitted with the exception of 1999, [redacted] did have sufficient net current assets to pay the proffered wage. In 1999, the petitioner lacked $11,866.00 to meet the proffered wage which the AAO finds could be made up under the special circumstances of this case in which the petitioner has demonstrated the ability to pay the proffered wage in six out of seven years (with increasing profitability) by various means out of net current assets (for example, by extension of the note payable to Jalal Enterprise Inc. listed as a current liability or from a short term loan repayable within one year).

ORDER: The appeal is sustained.

[9] The director made a negative inference and rejected this letter since a statement of employment experience at the [redacted], Houston, Texas, was not also included in a form G-325 found in the record. The letter meets all the regulatory criteria of the regulation at 8 C.F.R. § 204.5(l)(3). Further, on the Form 750 Part A, Section 15, eliciting information of the beneficiary's work experience, the beneficiary represented that he has been employed as a manager with the [redacted] Houston, Texas from May 1993 to November 1995 full-time (40 hours each week) with duties exactly as stated in Section 13 of the labor certification. Therefore, the job letter from [redacted], Houston, Texas dated March 1, 2006 is credible evidence.